STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 14, 2004
v	No. 247034 Wayne Circuit Court
JOHNNY TIPPINS, Defendant-Appellant.	LC No. 02-001578-01

Before: Donofrio, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant[1] appeals as of right from his convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b, entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Prior to trial, defendant indicated that he wished to waive his right to a jury trial. The trial court questioned defendant, concluded that his waiver was knowing, understanding, and voluntary, and accepted it. Defendant changed his mind and requested a jury trial. Subsequently, however, on the morning of trial, defendant again stated that he wished to waive his right to a jury and proceed with a bench trial. The trial court questioned defendant directly, ascertained that he understood his rights, that his decision did not result from any threat or promise, and that he had discussed the matter with counsel. The trial court found that defendant's waiver was knowing, understanding, and voluntary, and accepted it.

Prior to accepting a waiver of jury, a trial court must advise the defendant in open court of the constitutional right to trial by jury. The trial court must ascertain, by addressing the defendant directly, that the defendant understands the right to trial by jury, and that the defendant voluntarily chooses to waive that right and to be tried by the court. A verbatim record must be made of the waiver proceeding. MCR 6.402(B); *People v Mosly*, 259 Mich App 90, 93; 672 NW2d 897 (2003). We review a trial court's determination that a defendant validly waived his

[1] Defendant's appointed appellate counsel has filed a brief on appeal, and defendant has filed a supplemental brief pursuant to AO No. 1981-7, § 4(11) ("Standard 11").

right to a jury trial for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997).

Defendant argues that his convictions must be reversed because his jury waiver was invalid. We disagree. Defendant initially equivocated on his decision to waive his right to a jury; however, on the morning of trial, he expressed no uncertainty on the issue. The trial court addressed defendant directly and ascertained that he understood that he had an absolute right to have a jury trial, that he had discussed the matter with counsel, and that his decision was not the result of threats or promises. Defendant signed a waiver form. The trial court complied with MCR 6.402(B). The trial court's questioning was sufficient to allow it to properly ascertain that defendant understood his right to have a jury trial, and that he voluntarily waived that right. *Id.* at 596; *People v Shields*, 200 Mich App 554, 560; 504 NW2d 711 (1993). Defendant does not specify what further information the trial court could or should have obtained in order to assist it with its decision. Furthermore, defendant does not assert that he was coerced into waiving his right to a jury trial. Reversal is not warranted. *Leonard*, *supra*.

Defendant moved to suppress a statement he allegedly made after being taken into custody.[2] At a *Walker*[3] hearing the interrogating officer testified that defendant waived his *Miranda*[4] rights, did not request counsel, and made a statement. The officer denied that he threatened defendant, used physical force in order to coerce him to make a statement, or promised that he would be released if he made a statement. Defendant testified that the officer ignored his request to contact counsel, fabricated a statement, and coerced him into signing the statement by promising him that he would be released after he did so. The trial court denied defendant's motion to suppress the statement, finding that defendant made a statement and did so knowingly and voluntarily after being advised of his rights.

A statement made by an accused during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. The prosecution may not use a custodial statement unless it demonstrates that prior to questioning, the accused was informed of his rights. *Miranda*, *supra* at 444. Compliance with *Miranda* does not dispose of the issue of the voluntariness of a confession. *People v Godboldo*, 158 Mich App 603, 605-606; 405 NW2d 114 (1986). In determining voluntariness, the court should consider the totality of the circumstances, including the duration of detention and questioning, the defendant's age, intelligence, and experience, the defendant's physical and mental state, and whether the defendant was threatened or promised leniency. *People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997). No single factor is determinative. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

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[2] Defendant denied making the statement; however, the question whether a statement was made is separate from the issue of voluntariness. *People v Neal*, 182 Mich App 368, 371; 451 NW2d 639 (1990).

[3] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Once an accused has invoked his Sixth Amendment right to counsel, the police may not subject him to further interrogation unless the accused initiates communication concerning the pertinent investigation. *People v McRae*, 469 Mich 704, 715; 678 NW2d 425 (2004). The waiver of *Miranda* rights can constitute a knowing and intelligent waiver of both Fifth and Sixth Amendment rights. *Patterson v Illinois*, 487 US 285; 108 S Ct 2389; 101 L Ed 2d 261, 275-276 (1988).

In his supplemental brief in pro per, defendant argues that the trial court erred by denying his motion to suppress his statement. We disagree. The trial court found that the officer's testimony was more credible than defendant's, and did not believe defendant's version of the events. We give great deference to the trial court's assessment of the credibility of the witnesses. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992). The totality of the circumstances demonstrates that defendant was advised of his rights at the outset, that he waived his Fifth and Sixth Amendment rights, and that he knowingly and voluntarily made a statement. *Givens*, *supra*; *Fike*, *supra*; *Patterson*, *supra*. Defendant's assertion that the erroneous admission of his statement cannot be considered harmless error beyond a reasonable doubt is moot under the circumstances.

In his supplemental brief defendant also argues that his statement should have been suppressed because the police failed to make an audio or video recording of the interview. We disagree. As defendant concedes, this Court has addressed and rejected that argument. *Fike*, *supra* at 183-186. *Fike*, *supra*, is binding precedent. MCR 7.215(J)(1).

Defendant additionally argues that trial counsel rendered ineffective assistance by failing to subpoena a second officer to testify at the *Walker* hearing, by failing to elicit his testimony that he was under the influence of marijuana during the interrogation session, and by failing to properly investigate the case prior to trial. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id*. at 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant does not explain how testimony from the second officer would have changed the outcome of the suppression hearing. Furthermore, the trial court would have been entitled to reject testimony to the effect that defendant was under the influence of marijuana during the

interrogation. *Brannon, supra*. Defendant has not established that any error by counsel resulted in prejudice, *Carbin, supra*, and has not overcome the presumption that counsel rendered effective assistance. *Rockey, supra*.

Affirmed.

/s/ Pat M. Donofrio
/s/ Helene N. White
/s/ Michael J. Talbot